(13) (12)

Nos. 90-813 and 90-974

In The

Supreme Court of the United States

October Term, 1990

HOUSTON LAWYERS ASSOCIATION, et al.

Petitioners,

vs.

ATTORNEY GENERAL OF TEXAS, et al.

Respondents.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al.

Petitioners,

vs.

ATTORNEY GENERAL OF TEXAS, et al.

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE FLORIDA CONFERENCE OF CIRCUIT JUDGES, CONFERENCE OF COUNTY JUDGES OF FLORIDA, AND THE FLORIDA BAR IN SUPPORT OF RESPONDENTS

RONALD A. LABASKY
(Counsel of Record)
JENNIFER PARKER LAVIA
PARKER, SKELDING, LABASKY & CORRY
Post Office Box 669
Tallahassee, Florida 32302
(904) 222-3730
Counsel for *Amici Curiae* Florida Conference of Circuit Judges and Conference of County Court Judges of Florida

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399
(904) 561-5600

WILLIAM F. BLEWS
Florida Bar Legislation
Post Office Box 417
St. Petersburg, Florida 33731
(813) 822-8322

(Additional Counsel Listed On Inside Cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

JAMES FOX MILLER, President
The Florida Bar
Post Office Box 7259
Hollywood, Florida 33081-1259
(305) 962-2000

BENJAMIN H. HILL III
President-Elect, Florida Bar
Post Office Box 2231
Tampa, Florida 33601
(813) 221-3900

PAUL F. HILL
General Counsel,
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399
(904) 561-5600

BARRY S. RICHARD
Of Counsel, Florida Bar
Post Office Drawer 1838
Tallahassee, Florida 32301
(904) 222-6891

Nos. 90-813 and 90-974

In The

Supreme Court of the United States

October Term, 1990

HOUSTON LAWYERS ASSOCIATION, et al.

Petitioners,

vs.

ATTORNEY GENERAL OF TEXAS, et al.

Respondents.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al.

Petitioners,

vs.

ATTORNEY GENERAL OF TEXAS, et al.

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE FLORIDA CONFERENCE OF CIRCUIT JUDGES, CONFERENCE OF COUNTY JUDGES OF FLORIDA, AND THE FLORIDA BAR IN SUPPORT OF RESPONDENTS

The Florida Conference of Circuit Judges, the Conference of County Judges of Florida, and The Florida Bar, by

undersigned counsel, move the Court for leave to file a brief of *amici curiae* in support of Respondents and as grounds therefor would show:

1. The Florida Conference of Circuit Judges is an association of all active and retired circuit judges of Florida which is responsible for making recommendations to the state supreme court to improve the state judicial system.

2. The Conference of County Judges of Florida was created for the purpose of the improvement of the state judicial system.

3. The Florida Bar is an official arm of the Supreme Court of Florida. The Bar consists of all attorneys licensed to practice law in the state. One of the purposes of the Bar is the improvement of the administration of justice.

4. The Conferences and the Bar support the position of Respondents that section 2 of the Voting Rights Act does not apply to elections of trial judges.

5. The Conferences and the Bar request leave to file a brief of *amici curiae* to bring to this Court's attention the detrimental impact which would result in the State of Florida if section 2 of the Voting Rights Act is interpreted to require single-member districts in elections of trial judges, and do not believe that such impact will be presented to the Court by any of the parties currently permitted to file briefs in this action.

6. The Conferences and the Bar have made a good faith effort to obtain the permission of the parties to file a brief, but such permission has been denied by League of United Latin American Citizens. Permission has been

granted by Houston Lawyers' Association, Jesse Oliver, Judge F. Harold Entz, Tom Rickhoff, Susan D. Reed, John J. Specia, Jr., Sid L. Harle, Sharon Macrae, and Michael P. Peden, Bexar County Texas State District Judges, Judge Sharolyn Wood, and the Attorney General of Texas as per accompanying letters.

WHEREFORE, The Florida Conference of Circuit Judges, The Conference of County Judges of Florida, and The Florida Bar respectfully request leave to file a brief of *amici curiae* in support of Respondents.

Respectfully submitted,

RONALD A. LABASKY
(Counsel of Record)
JENNIFER PARKER LAVIA
PARKER, SKELDING, LABASKY
& CORRY
Post Office Box 669
Tallahassee, Florida 32302
(904) 222-3730
Counsel for *amici curiae*
Florida Conference of Circuit
Judges and Conference of
County Judges of Florida

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399
(904) 561-5600

JAMES FOX MILLER, President
The Florida Bar
Post Office Box 7259
Hollywood, Florida
33081-1259
(305) 962-2000

BENJAMIN H. HILL III
President-Elect, Florida Bar
Post Office Box 2231
Tampa, Florida 33601
(813) 221-3900

WILLIAM F. BLEWS
Florida Bar Legislation
Post Office Box 417
St. Petersburg, Florida 33731
(813) 822-8322

PAUL F. HILL
General Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399
(904) 561-5600

BARRY S. RICHARD
Of Counsel, Florida Bar
Post Office Drawer 1838
Tallahassee, Florida 32301
(904) 222-6891

Nos. 90-813 and 90-974

In The

Supreme Court of the United States

October Term, 1990

HOUSTON LAWYERS ASSOCIATION, et al.

Petitioners,

vs.

ATTORNEY GENERAL OF TEXAS, et al.

Respondents.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al.

Petitioners,

vs.

ATTORNEY GENERAL OF TEXAS, et al.

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE FLORIDA CONFERENCE OF CIRCUIT JUDGES, CONFERENCE OF COUNTY COURT JUDGES OF FLORIDA, AND THE FLORIDA BAR IN SUPPORT OF RESPONDENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

SECONDARY MATERIALS

INTEREST OF THE AMICI CURIAE

The Florida Conference of Circuit Judges is an entity created by Florida law. Fla. Stat. § 26.55. Its members are all 421 active and all retired circuit judges of the state. *Id.* § 26.55(1). The Conference is responsible for making recommendations to the state supreme court to improve the state judicial system. *Id.* § 26.55(3). The Conference of County Judges of Florida was created by rule of the Supreme Court of Florida with the stated purpose of the "betterment of the judicial system of the State." Fla. R. Jud. Admin. 2.120. Its members are the 242 county judges of Florida. Together the Conferences of Circuit and County Judges constitute the trial judges of Florida. The Florida Bar is an official arm of the Supreme Court of Florida charged with the discipline of all attorneys licensed to practice law in the State of Florida. Fla. Const. art. V, § 15; Rules Regulating The Florida Bar – General Introduction. Among the Bar's chartered purposes is the improvement of the administration of justice. Rules Regulating The Florida Bar 1-2. The issue raised in this case directly impacts upon the quality of legal services that may be accorded the people of Florida and is considered an especially appropriate matter for commentary from The Florida Bar. The Conferences and The Florida Bar have a vital interest in preventing the inevitable harm to the Florida judicial system if 42 U.S.C. § 1973 is interpreted to require subdistricting in the elections of trial judges.

SUMMARY OF THE ARGUMENT

In response to this Court's holding in *Mobile v. Bolden*, 446 U.S. 55 (1980), Congress amended section 2 of the Voting Rights Act to provide that a violation may be shown by proving a discriminatory effect alone. Congress did not intend that section 2 of the Voting Rights Act as amended apply to trial court judges. The plain meaning of the amendment to the statute controls, thereby obviating the need for resort to the legislative history.

The specified statute provides that a violation is shown if, based on the totality of the circumstances, it is shown that a protected class of citizens has less opportunity than other electors "to participate in the political process" and "to elect *representatives* of their choice." 42 U.S.C. § 1973(b) (emphasis added). At the time of the amendment numerous federal courts had stated that judges are not representatives. Congress is presumed to know of the judicial construction of existing law. Therefore, it must be presumed that Congress was aware when it chose the word "representative" rather than another, broader term, that it was specifying that judges were not to be within the scope of that section of the Act. As will be shown by a review of the relevant case law and specific reference to provisions governing judges in Florida, judges are not "representatives" and are, therefore, not included within the ambit of the Act.

Even if the Act is construed to include judges within its reach, vote dilution claims do not apply to trial judges because such judges hold single-member offices. Since the office of a judge is indivisible, capable of being held by only one person, the electorate cannot be divided into

subdistricts. Therefore, the en banc decision of the Fifth Circuit Court of Appeals should be affirmed.

ARGUMENT

I. THE PLAIN LANGUAGE OF 42 U.S.C. § 1973 EXCLUDES JUDGES

The issue before this Court is whether section 2 of the Voting Rights Act applies to elections of trial judges. For reasons which follow, *amici curiae* respectfully request this Court to affirm the en banc decision of the court below that section 2 does not apply to trial judges.

The Voting Rights Act "is directed at procedures that deny racial minorities a fair opportunity to participate in the electoral process, and not at those that may have the result of reducing the likelihood that a minority will elect its preferred candidate to a single-member office." *Butts v. City of New York*, 779 F.2d 141, 151 (2d Cir. 1985). "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). This Court and numerous commentators agree that multi-member districts and at-large voting schemes may prevent minorities from electing the representatives of their choice. *Id.* at 47-48. However, "multimember districts are not per se unconstitutional." *White v. Regester*, 412 U.S. 755, 765 (1973). In the case of judges, multi-member districts are not unconstitutional because judges are not "representatives" and because judges hold single-

member offices. The majority in the lower court accepted the former contention and, therefore, did not reach the latter, which was relied on by the concurrence.

The Voting Rights Act, prior to the 1982 amendments, read as follows:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

42 U.S.C. § 1973 (1975). This Court held that to prove a violation of the Act, minority voters must prove that the challenged voting practice was adopted intentionally for a discriminatory purpose. *Mobile v. Bolden*, 446 U.S. 55 (1980). In response, Congress amended the statute in 1982 to "make clear that a violation could be proved by showing discriminatory effect alone." *Thornburg*, 478 U.S. at 35. The statute as amended reads as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of

> citizens protected by subsection (a) of this section in *that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.* The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (emphasis added). The italicized language of subsection (b) is substantially identical, with one glaring exception, to the following italicized language in Justice White's opinion in *White v. Regester,* 412 U.S. at 766:

> The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question – *that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.*

Id. (emphasis added). A comparison of the italicized portions of the statute and the opinion reveals that the only significant change is that instead of saying "to elect *legislators* of their choice," Congress said, "to elect *representatives* of their choice." It is hard to believe that Congress carelessly chose a word to replace "legislators." The fact that Congress chose the word "representatives" instead of some broader term such as "candidates" or "public officials" leads to the inescapable conclusion that Congress did not intend to include judges within the mandate

of the statute. The well-established judicial construction of the term "representatives," at the time of the amendment, did not include judges. *See, e.g., Sagan v. Commonwealth of Pennsylvania*, 542 F.Supp. 880 (W.D. Pa. 1982); *Concerned Citizens v. Pine Creek Conservancy District*, 473 F.Supp. 334 (S.D. Ohio 1977; *Buchanan v. Gilligan*, 349 F.Supp. 569 (N.D. Ohio 1972); *Wells v. Edwards*, 347 F.Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973); *Holshouser v. Scott*, 335 F.Supp. 928 (M.D.N.C. 1971), *aff'd mem.*, 409 U.S. 807 (1972). Congress is generally presumed to be "knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988). Therefore, presumably Congress knew when using the word "representatives," it would not include judges within the reach of the statute. One cannot assume that Congress made such a choice lightly. Thus, the majority in the court below found it "all but impossible to avoid the conclusion that Congress intended to apply its newly imposed results test to election for representative, political offices but not to vote dilution claims in judicial contests. . . . " *LULAC v. Clements*, 914 F.2d 620, 628 (5th Cir. 1990) (en banc).

The lower court herein concluded that "to suggest that Congress chose 'representative' with the intent of including judges is roughly on a par with suggesting that the term *night* may, in a given circumstance, properly be read to include *day*." *Id.* at 629. Given the clarity of the statute, the majority stated, "In the words of Justice Frankfurter, writing for a unanimous court in *Greenwood v. United States*, it appears to us that 'this is a case for applying the canon of construction of the wag who said,

when the legislative history is doubtful, go to the statute.' 350 U.S. 366, 374 (1955)." *Id.* at 630.

The unremarkable notion that judges are not representatives accords with traditional notions of the role of judges in American government. This is reflected in the cases decided before the 1982 amendment which conclude that judges are not representatives. In holding that the one-man, one-vote rule does not apply to judges, a Louisiana district court, in a decision affirmed by this Court, cited the purpose of the rule as being "to make sure that each official member of an elected body speaks for approximately the same number of constituents." *Wells v. Edwards*, 347 F.Supp. at 455; *see also Concerned Citizens v. Pine Creek Conservancy District*, 473 F. Supp. 334, 337 (S.D. Ohio 1977) (quoting *Wells*). The court concluded that since judges do not speak for constituents, the one-man, one-vote rule does not apply to the judiciary. *Wells*, 347 F.Supp. at 455. "The state judiciary is not responsible for achieving representative government." *Buchanan v. Gilligan*, 349 F.Supp. 569 (N.D. Ohio 1972). "Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency." *Stokes v. Fortson*, 234 F.Supp. 575, 577 (N.D. Ga. 1964); *see also Sagan v. Commonwealth of Pennsylvania*, 542 F. Supp. 880, 882 (W.D. Pa. 1982) (quoting *Stokes*).

An examination of Florida provisions governing judges illustrates that judges are not intended to be "representatives." The Code of Judicial Conduct governing Florida judges recognizes the appropriate role of judges. The Code, based on the American Bar Association Code

of Judicial Conduct, adopted by the Supreme Court of Florida in 1973, is replete with admonitions against partiality on the part of judges. *In re The Florida Bar – Code of Judicial Conduct*, 281 So. 2d 21 (Fla. 1973). Canon 1 provides:

> An *independent* and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and *independence* of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Id. at 23 (emphasis added). Canon 3 sets forth more explicitly the requirement that judges *not* be responsive to constituents: "A judge should be faithful to the law and maintain professional competence in it. *He should be unswayed by partisan interests, public clamor, or fear of criticism.*" *Id.* at 24 (emphasis added). Thus, partisan politics must play no role in the decision making process of a judge. This ideal prompted the lower court herein to note: "To describe the judge's office merely as 'not a representative one' is a gross understatement; in truth, it is rather the precise antithesis of such an office. Just insofar as a judge *does* represent anyone, he is not a judge but a partisan." *LULAC*, 914 F.2d at 628. Additionally, the permissible campaign conduct of judicial candidates is circumscribed by the Code:

> A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

* * *

> should not make pledges or promises of conduct in office other than the faithful and *impartial* performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

281 So. 2d at 32 (emphasis added). Thus, a judicial candidate may not properly campaign based on a promise to represent any particular constituency or viewpoint. A judge makes only one campaign promise and that is that he will remain impartial at all times. Therefore, he cannot possibly be said to "represent" *any* group of people, minority or otherwise. No group is entitled to be "represented" by a judge; therefore, no group has the right to elect a judge of its choice.

In Florida, supreme court justices and district court of appeal judges are appointed. Circuit and county judges are currently elected, pursuant to the Florida Constitution. Circuit judges have been elected since 1942. County judges were elected as early as 1885. Even though some Florida judges are elected, Florida has taken steps to reduce the political aspects of judicial elections. Florida law provides that such elections must be nonpartisan. Fla. Stat. § 105.011(2). Reference to political party affiliation is prohibited on the ballot for judicial office. Fla. Stat. § 105.043(3). Candidates for judicial office may not:

> (1) Participate in any partisan political party activities, except that such candidate may register to vote as a member of any political party and may vote in any party primary for candidates for nomination of the party in which he is registered to vote.
>
> (2) Campaign as a member of any political party.
>
> (3) Publicly represent or advertise himself as a member of any political party.
>
> (4) Endorse any candidate.
>
> (5) Make political speeches other than in his own behalf.
>
> (6) Make contributions to political party funds.
>
> (7) Accept contributions from any political party.
>
> (8) Solicit contributions for any political party.
>
> (9) Accept or retain a place on any political party committee.
>
> (10) Make any contribution to any person, group, or organization for its endorsement to judicial office.
>
> (11) Agree to pay all or any part of any advertisement sponsored by any person, group, or organization wherein the candidate may be endorsed for judicial office by any such person, group, or organization.

Fla. Stat. § 105.071. Violation of the statute is a first degree misdemeanor. *Id*. It is also a second degree misdemeanor for any political party or partisan political organization to "endorse support, or assist any candidate in a campaign for election to judicial office." Fla. Stat. § 105.09. A federal district court has held Fla. Stat.

§ 105.09 unconstitutional. *Concerned Democrats v. Reno*, 458 F.Supp. 60 (S.D. Fla. 1978), *rev'd on other grounds*, 601 F.2d 891 (5th Cir. 1979). Although the district court held that Florida had a compelling interest "in maintaining the non-partisan qualities of its [judicial] elections," the court held that the state had failed to use the least intrusive means to achieve that goal. The court's comments on the state's interest in nonpartisan judicial elections are enlightening. The Florida Attorney General's office had argued that "the State's interest was in maintaining the integrity and impartiality of the state judiciary." *Id.* at 64. The district court agreed, stating:

> There can be no question that the state has a vital interest in assuring that its judges are free from direct political pressure; that they can render decisions independent of political ramifications; and that they can discharge their duties free from the pressure, sometimes subtle and sometimes otherwise, that can be applied by political groups.

The court further noted the existence of "an obvious interest to both the public and the Legislature in having judicial candidates free of the appearance of impropriety," and concluded that the "appearance of partisanship will hardly foster public confidence in the courts." *Id.* at 65.

That Florida and other states have provided for election of some judicial officials does not signify that such elected officials must, therefore, be representatives. The interests of all groups participating in elections of judges are the same; the electorate seeks judges who will comply with traditional requirements of honesty, integrity, and impartiality. Judicial elections are not held to give any

group the opportunity to have its partisan views represented. Rather, judicial elections "assure the public that the judicial function will be kept accountable to the common sense of the electorate." *LULAC*, 914 F.2d at 632, (Clark, C.J., concurring specially). In judicial elections, "[i]t is expected that candidates who lack training or a reputation for honesty or sound intellect will not be elected. In like manner, those who are indolent, will not decide cases, or decide erratically will not be re-elected." *Id.* Thus, the needs of all voters are identical. The goal of judicial elections is the attainment of a qualified and impartial judiciary. Requiring subdistricting in judicial elections does nothing to further that goal; in fact, subdistricting has exactly the opposite effect and creates judges who are partisans, chosen not for their qualifications or integrity, but for their willingness, as perceived by the electorate, to represent a particular point of view or a particular geographical region.

In addition, the Florida judicial elections have been made less political by the creation of judicial nominating commissions and judicial qualifications commissions.

The judicial qualifications commission is:

> vested with jurisdiction to investigate and recommend to the Supreme Court of Florida the removal from office of any justice or judge whose conduct . . . demonstrates a present unfitness to hold office, and to investigate and recommend the reprimand of a justice or judge whose conduct . . . warrants such a reprimand.

Fla. Const. art. V, § 12(a). The judicial qualifications commission is composed of six judges (two district court of appeal judges, two circuit judges, and two county

judges), two electors who are attorneys, and five electors who are not attorneys. The judges are chosen by their respective courts; the attorneys are chosen by the governing board of the Florida Bar and the lay people are appointed by the governor.[1] *Id.* All members of the commission who are not subject to impeachment may be suspended by the governor and removed by the senate. Fla. Const. art. V, § 12(c), art. IV, § 7.

The commission is empowered to adopt its own rules, which "may be repealed by general law enacted by a majority vote of the membership of each house of the legislature." Fla. Const. art. V, § 12(d). The commission's proceedings are confidential until the filing of formal charges with the clerk of the supreme court. *Id.* Once a formal charge is filed all proceedings are public. *Id.* With seven members concurring, the commission may "recommend to the supreme court the temporary suspension of any justice or judge against whom formal charges are pending." *Id.* Such suspension may be with or without compensation. *Id.* § 12(f). The supreme court may, upon recommendation of two-thirds of the commission members, reprimand, remove, or involuntarily retire a justice

---

[1] The constitution further provides that the members of the commission serve staggered terms not to exceed 6 years and that no member of the commission except a justice or judge is eligible for state judicial office while a member of the commission and for 2 years thereafter. Nor may members of the commission "hold office in a political party or participate in any campaign for judicial office or hold public office." Fla. Const. art. V, § 12(b). As an exception to the last rule, "a judge may participate in his own campaign for judicial office and hold that office." *Id.* The commission elects one of its members as chairman. *Id.*

or judge. Fla. Const. art. V, § 12(f). The constitution provides that "Malafides, scienter or moral turpitude on the part of a justice or judge shall not be required for removal from office of a justice or judge whose conduct demonstrates a present unfitness for office." *Id.*

Another effort to reduce the political aspects of Florida judicial elections has been the creation of the judicial nominating commissions which are responsible for nominating candidates to fill vacancies on the supreme court, district courts of appeal, circuit courts and county courts. Fla. Const. art. V., § 11. A separate judicial nominating commission exists "for the supreme court, each district court of appeal, and each judicial circuit for all trial courts within the circuit." Fla. Const. art. V, § 11(d). The judicial nominating commission at each level of the court system is responsible for establishing its rules, which "may be repealed by general law enacted by a majority vote of the membership of each house of the legislature, or by the supreme court, five justices concurring." *Id.* The commission's proceedings, except for deliberations, are public. *Id.*

The historical development of the judiciary in Florida has "been accompanied by a steady diminution in political influence of the general population and the elective legislative and executive branches of government in judicial matters and a steady rise in the influence of the judiciary. . . . " Little, *An Overview of the Historical Development of the Judicial Article of the Florida Constitution*, 19 Stetson L. Rev. 1, 40 (Fall 1989). Little concludes that "accountability of the judicial branch of state government has gradually been transferred away from the electorate

and its elected representatives to the supreme court and the Florida Bar." *Id.* at 41.

The state of Florida has a substantial interest in maintaining circuit-wide and county-wide election of judges. "The history of the judicial article [of the Florida Constitution] suggests that at least from immediate post-civil war times onward, the judiciary has frequently been strained to cope with demands for access to courts." Little, *supra*, at 37.[2] Multi-judge circuits have been authorized in Florida since 1933, which "increased the flexibility of the legislature to adjust the numbers of circuit judges as required by changed demands on the court." *Id.* at 22.

The Florida experience, therefore, reflects a trend, presumably not unique among the states, toward reducing political aspects of the judiciary. The creation of single-member districts in judicial elections would be anathema to the ideal of a nonpartisan, impartial, and independent judiciary.

II. VOTE DILUTION CLAIMS DO NOT APPLY TO JUDGES WHO HOLD SINGLE-MEMBER OFFICES

The use of at-large elections rather than single-member districts "may have the effect of denying areas with large concentrations of minority voters the opportunity to pool their strength and elect members of their class from

---

[2] The Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Fla. Const. art. I, § 21.

such areas." *Butts v. City of New York*, 779 F.2d at 148. Even if judges are included within the reach of section 2 of the Voting Rights Act, vote dilution claims do not apply to trial judges because such judges hold single-member offices. The remedy of subdistricting is, therefore, inappropriate. The purpose of subdistricting is to ensure that the minority vote is not diluted; that is that minorities have a voice in the decision making process because they are able to elect a representative of their choice to speak for their views to an elected body. However, as noted by the Second Circuit Court of Appeals:

> There can be no equal opportunity for representation within an office filled by one person. Whereas, in an election to a multi-member body, a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts in which it is dominant, there is no such thing as a "share" of a single-member office.

Id. Thirty-seven of Florida's sixty-seven counties have only one county judge. Fla. Stat. § 34.022. The fact that in some counties and circuits several individuals hold office with the same title, "circuit judge" or "county judge," does not convert that office into a multimember office. Trial judges do not act together. Each judge has sole responsibility for the cases on his docket. Even in cases in which another judge is brought in to hear a portion of a case, for example pretrial motions, each judge makes the decisions on his portion of the case independently. Florida, like Texas, "has structured its government such that it wields judicial power at the trial level through trial judges acting separately, with a coterminous or linked electoral and jurisdictional base, each exercising the sum

of judicial power at that level." *LULAC*, 914 F.2d at 646 (Higginbotham, J., concurring).

The concurring opinion of Judge Higginbotham contained the argument that if judicial districts are divided into subdistricts minority litigants stand little chance of appearing before a judge who is responsive to their special concerns. *Id.* at 650. The dissent vehemently rejected the suggestion, implicit in the concurrence, that judges must be accountable to potential litigants. *Id.* at 667. However, subdistricting would not only diminish a minority voter's likelihood of appearing as a litigant before a judge in whose election the voter had some influence, subdistricting would greatly diminish the minority voter's influence over the judges who decide all cases. Minority voters will have influence over only a minute percentage of all cases decided. The vast majority of all cases will be decided by judges over whom a minority subdistrict voter holds absolutely no sway. This situation differs greatly from that of a true multimember office, such as a legislature, in which the candidate representing a minority has a voice in *all* decisions. Subdistricting in the elections of true multimember bodies ensures that the minority viewpoint will be represented in all decision making. Subdistricting in judicial elections, however, would operate to deprive the minority of a voice in most decisions because of the independence of each judge. As stated by one Eleventh Circuit Judge apparently opposed to subdistricting in all elections, subdistricting "serves those who would be candidates well, but it disserves the voters, who lose the opportunity to have a political impact upon and obtain political responsiveness from *all* candidates and elected officeholders."

United States v. Dallas County Commission, 850 F.2d 1433, 1444 (11th Cir. 1988) (Hill, J., concurring specially). Therefore, subdistricting in judicial elections is inappropriate and is not required by 42 U.S.C. § 1973.

CONCLUSION

Based on the foregoing, this Court should affirm the en banc decision of the Fifth Circuit Court of Appeals that section 2 of the Voting Rights Act does not apply to the election of trial judges.

Respectfully submitted,

RONALD A. LABASKY
(Counsel of Record)
JENNIFER PARKER LAVIA
PARKER, SKELDING, LABASKY
& CORRY
Post Office Box 669
Tallahassee, Florida 32302
(904) 222-3730
Counsel for *amici curiae*
Florida Conference of Circuit Judges and Conference of County Judges of Florida

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399
(904) 561-5600

JAMES FOX MILLER, President
The Florida Bar
Post Office Box 7259
Hollywood, Florida
33081-1259
(305) 962-2000

BENJAMIN H. HILL III
President-Elect, Florida Bar
Post Office Box 2231
Tampa, Florida 33601
(813) 221-3900

WILLIAM F. BLEWS
Florida Bar Legislation
Post Office Box 417
St. Petersburg, Florida 33731
(813) 822-8322

PAUL F. HILL
General Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399
(904) 561-5600

BARRY S. RICHARD
Of Counsel, Florida Bar
Post Office Drawer 1838
Tallahassee, Florida 32301
(904) 222-6891